IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948.

No. 206 Miscellaneous

Ex Parte JOSEPH COLLETT,
Petitioner

JOSEPH COLLETT,
Petitioner,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
Respondent.

MEMORANDUM IN REPLY TO BRIEF OF RESPONDENT.

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STATEMENT.

On January 26, 1949, petitioner received through the United States mail from Woodward, Hobson and Fulton, attorneys in Louisville, Kentucky, a brief, entitled, "Brief Of The Respondent, Honorable Fred L. Wham, U. S. District Judge, etc." A brief in opposition to a motion for leave to file petition for order to show cause why writs of mandamus and prohibition should not issue in this case. In order that the court may have a

fair perspective of the situation we suggest that the Honorable Fred L. Wham is not the true respondent in this case but that the Louisville and Nashville Railroad Company is, in fact, the true respondent. The Honorable Robert P. Hobson, whose name appears among the attorneys on respondent's brief, personally appeared in the district court of the Honorable H. Church Ford, District Judge for the Eastern District of Kentucky and personally appeared and opposed petitioner's motions first, to dismiss said cause, which motion was overruled, and, secondly, to stay proceedings in said court pending the outcome of the case at bar, which motion was granted. Members of the firm of Woodward, Hobson & Fulton, whose names appear on respondent's brief, are listed as counsel for the Louisville and Nashville Railroad Company in Martindale-Hubbell Law Directory—1948 Edition, volume I, page 889.

Respondent sets out five reasons why petitioner's motion should not be allowed We will consider said reasons in their proper order and under their exact headings in respondent's brief on pages 2 and 3 of said brief.

I.

Petitioner has made no proper application for the same relief to the Court of Appeals for the Seventh Circuit and to the Court of Appeals for the Sixth Circuit.

Respondent, in urging this proposition upon the Court, emphasizes the reasons why, in the interest of justice, expedition in settling the question in controversy and in the saving of the time of many courts with the attending expense, why this court should allow petitioner's motion. The reason that petitioner did not first seek redress in two separate courts of appeal, with attending

expenses, with possible delays and with the likelihood of divers opinions, was because he was certain that probably, or in any event finally, this court would be called upon to decide the question.

By this objection respondent has significantly given the reason why Congress felt, that in all justice and fairness, something should be done to protect railroad employees and accordingly passed the Federal Employers' Liability Act including venue, section 6.

This objection is of significance in showing the temper of the railroads generally toward their injured; and by its voluntary appearance, flagrantly in this case, where the respondent's employee, who can neither read nor write, was induced to sign a release for $8,000.00 for the loss of both legs near his hips due to the respondent's negligence. Said sum is about equal to his average wage and the cost of sustenance for himself, his wife and four children over a period of about two years.

II.

There is no issue of vital importance this court in exercising its discretion in petitioner's favor.

The respondent here urges dismissal of the petition herein because of lack of importance. It appears to us that its actions belie its words. We are impressed with the idea that if it did not consider this matter of the utmost importance it would not have employed attorneys, written a brief, and voluntarily submitted itself to the jurisdiction of this court. We cannot but be impressed with the vital importance of this matter where the welfare and well-being of over 1,300,000 families of railroad workers are, or may be, directly interested in the outcome, and where probably an equal number of

railroad officials, stock and bond holders are adversely interested. Except for tax, conscription and compulsory military training laws, we cannot now conceive of a matter of such vital importance to as many people.

This case is of vital public importance and of unusual character. However, great or vital, public importance is not a necessary prerequisite to permit this court to assume jurisdiction. In the case, *In re Chetwood*, Petitioner, 17 S. Ct. 385, 165 U. S. 443, decided February 15, 1897, this court said:

> "By Section 14 of the Judiciary Act of September 24, 1789 (1 Stat. 81, c. 20), carried forward as section 716 of the Revised Statutes [since carried forward as section 377 U.S.C.A. 1940 ed. and now section 1651, Title 28, U.S.C. effective September 1, 1948], this court and the Circuit Courts and District Courts of the United States were empowered by Congress 'to issue all writs not specifically provided for by statute, which may be agreeable to usages and principles of law'; and, under this provision, we can undoubtedly issue writs of certiorari in all proper cases. (citing) *Amer. Construction Company* v. *Jacksonville Railroad Company*, 148 U.S. 372, 380."
>
> "This court may issue writs of certiorari in all proper cases and will do so when the circumstances imperatively demand that form of interposition, to correct excesses of jurisdiction, and in the furtherance of justice."

The *Chetwood* case was a petition for the vacating of or prohibition upon certain orders of the District Court of the United States for the Northern District of California in the suit of *Stateler* v. *The California National Bank of San Francisco, et al.*, enjoining the bank and John Chetwood, Jr. from prosecuting a writ of error from this court in the name of the bank as plain-

tiff in error; directing Chetwood to dismiss a second writ of error from this court; and punishing Chetwood and his counsel as for contempt of court in suing out the writs. Leave was granted to file the petition, and rule to show cause was entered thereon to which return was made. In issuing the writ of certiorari the court said:

> "Although as observed in that case (*Amer. Construction Company* v. *Jacksonville Railroad Company* 148 U.S. 372, 380), this writ has not been issued as freely by this court as by the Court of the Queen's Bench, England, and prior to the Act of March 3, 1891 c. 517, 26 Stat. 826, had been ordinarily used as an auxiliary process merely, yet, when the circumstances imperatively demand that form of interposition the writ may be allowed, as at common law, to correct excesses of jurisdiction and in the furtherance of justice."

The court will note that in this case there was no vital public interest involved. In fact, the only people involved were the petitioner and people who had a personal interest in the bank. Vital public interest is not a prerequisite to this court assuming jurisdiction of the case at bar.

In the *Chetwood* case the court stated further, that:

> "Judgments in proceedings in contempt are not reviewable here on appeal or error but they may be reached by certiorari in the absence of any other adequate remedy."

As in the *Chetwood* case where there was no right of appeal from judgments in proceedings as of contempt of court, petitioner here had no right of appeal from the assumed discretionary order of Judge Wham and was without adequate remedy except by this or some such extraordinary proceeding.

We submit that in unusual or extraordinary proceedings, only important within themselves, the right of this court to assume jurisdiction has been firmly well-established for more than 40 years as expounded in the *Chetwood* case which has withstood the acid test of time.

III.

This court lacks jurisdiction to grant the relief requested, as the most the petition could possibly show as error is the exercise of judicial power, in their illegal seizure of judicial power by the District Courts.

Here the respondent urges that the petition be dismissed for lack of jurisdiction of this court. As we have covered this subject in the foregoing paragraph as well as in our original petition on page 6, we will not impose upon the court by arguing that subject further, except to say that by its voluntary appearance, not specially, not as *amicus curiae*, but generally, respondent has submitted to the jurisdiction of this court and waived the question of jurisdiction.

Respondent also urges that as a prerequisite to the allowance of petitioner's motion, he must show that Judge Wham's order in transferring his case was an "illegal seizure of judicial power by the District Court". This is not a necessary prerequisite; all petitioner need show is that Judge Wham exercised an excess of jurisdiction. (See *In re Chetwood* 165 U. S. 443.)

IV.

The power of this court is sought, not in aid of its appellate jurisdiction, but as a substitute for an appeal which is not permitted by statute.

Your petitioner seeks the protection of this court for the reason that he has no right of appeal and no other adequate remedy.

V.

Petitioner's contention that Federal Employers' Liability Act cases are not within the scope of Section 1404(a) of Title 28 United States Code is erroneous.

Respondent cites three district court cases in support of its contention that section 1404(a) permitting the transfer of any civil action to any other district or division where it might have been brought pertains to actions under the Federal Employers' Liability Act.

We desire at this time to call the Court's attention to the case of *Pascarella* v. *N. Y. Cent. R. Co.*, 81 Fed. Supp. 95, (N.Y.D.C.) where the Honorable Judge Rayfiel held that section 1404(a) was not applicable to actions brought under the Federal Employers' Liability Act.

This clearly shows that there is a substantial divergence of opinion by eminent jurists and indicates that this Court should allow petitioner's motion and finally settle the matter.

Respondent on page 12 of its brief, contends that when Congress desired to exempt cases under the Federal Employers' Liability Act it specifically did so as in Section 1445(a) of Title 28 U.S.C. which denied

the right of removal of such cases from state courts to federal courts. Instead of carrying the import that respondent attaches to it, we contend that this section shows that the tempest of Congress was to make certain that cases where railroad receivers and trustees are defendants could not be removed from a state to a District court of the United States. This strengthens our position, that Congress intended by this section to make doubly sure that railroad employees were protected as provided in section 6 of the Federal Employers' Liability Act, wherein it is specifically provided that there is no right of removal from a state to a federal court. (See Reviser's notes, section 1445 on page 1856 U.S.C. Congressional Service.)

On page 15 of its brief, respondent has seen fit to quote Professor Moore's views on the applicability of section 1404(a) to cases brought under the Federal Employers' Liability Act. We would like to call the Court's attention to chapter 87 of the Revised Judicial Code entitled "District Courts; Venue." In this chapter following the general venue provision[1] there are assembled special venue provisions, covering among other items, a provision relating to "patents and copyrights".[2] We contend that the venue provisions which were re-enacted in chapter 87 were all of the civil actions in which the Court is empowered to apply the doctrine of "*forum non conveniens*". It is significant to note no menton was made in this chapter concerning venue under the Federal Employers' Liability Act or under the Anti-Trust Laws. We believe it can be safely said that Professor Moore's note on page 2121—Note 107, contained in Volume 3, Moore's

[1] 28 U.S.C.A. 1391.
[2] Id. 1400.

Federal Practice (2nd edition), published December, 1948, wherein he states that:

> "Any action in section 1404(a) includes suits subject to special venue statutes, as suits for patent infringement and suits under the Federal Employers' Liabilty Act, as well as actions subject to the general venue statute",

is without foundation and is contrary to the well established rule that:

> "Where there are two statutes, upon the same subject, the earlier being special and the later general, the presumption is, in the absence of an express repeal or an absolute incompatibility, that the special is intended to remain in force as an exception to the general. (*Townsend* v. *Little*, 109 U. S. 504; 512; *Ex Parte Crow Dog*, id. 556, 570; *Rogers* v. *Texas*, 185 U. S. 83, 87-89.)"[1]

A careful study of the subject discloses that there is no mention of section 6 of the Federal Employers' Liability Act in chapter 87.

On page 17 of its brief, respondent contends that the failure of the passage of the Jennings Bill (H.R. 1639; 80th Congress) is not persuasive that section 1404(a) was intended to exclude civil actions under the Federal Employers' Liability Act. May we add to what we wrote in our original brief at page 21, that the Jennings Bill barely passed the House after heated and extended arguments and never reached the floor of the Senate. The purpose of this Bill was to displace section 6 of the Federal Employers' Liability Act. The Jennings Bill passed the House on July 17, 1947, just 10 days before the same House passed the revision containing section 1404(a) without debate. It is significant that not one word was

[1] Washington v. Miller, 235 U. S. 422, 428 (1914).

said to indicate that the House had just ten days prior thereto passed the revision containing section 1404(a). If Congress had actually intended to affect the venue provisions of the Federal Employers' Liability Act in the Judicial Code revision, some of the Congressmen would have suggested that the long and stormy debate on the Jennings Bill was unnecessary in view of the passing of the revision ten days earlier.

On page 16 of its brief, respondent contends that there was no repeal of section 6 of the Federal Employers' Liability Act by section 1404(a) by implication, but on the other hand contends that the action still may be brought in any district meeting the requirements of the special venue statute but states that such a case can then be removed at the discretion of any district court under the rule of *forum non conveniens*. Under such a rule injured railroad workers and their widows and orphans would have lost all of the rights and advantages that Congress has given them, step by step, over a period of 40 years. A careful study of the history of the enactment of section 1404(a) discloses no such intention on the part of Congress, but on the contrary, by not including section 6, of the Federal Employers' Liability Act under chapter 87 (the chapter fixing the venue in civil actions) Congress definitely showed their intention not to interfere or take away the rights of railroad employees which it had so arduously constructed.

In support of the foregoing, we again call the Court's attention to the opinion of the Honorable Judge Rayfiel, U. S. District Court; Eastern District, New York, 81 F. Supp. 95, where, on page 99, the court said:

> "The failure to make specific reference to Section 6 of the Federal Employers' Liability Act, or at least to include the said section in the aforemen-

tioned schedule or table of laws repealed, appears to confirm the opinion of this Court that it was not the intent of the Congress to make Section 1404(a) of the New Federal Judicial Code applicable thereto."

"The said Section 1404(a), except to the extent that it applies to those venue provisions contained in Chapter 87, aforementioned, merely makes statutory the doctrine of '*forum non conveniens.*' To make it applicable to actions under the Federal Employers' Liability Act would be to negative the aforementioned decisions of the Supreme Court, and I am unwilling to agree that that was the intent of the Congress."

"Granting venue rights under Section 6 of the Federal Employers' Liability Act was a meaningful and purposeful exercise of legislative prerogative by Congress, and should be taken away only by an equally specific discharge of its legislative function. I do not think that Section 1404(a) of the new code accomplished that purpose. * * *"

In respondent's last paragraph on page 17 of its brief is projected new matter. Here respondent contends that section 1404(a) should be applied to actions pending at the date it became effective, urging that the rule forbidding such application pertains only to statutes dealing with substantive rights and not to procedure.

We contend that this is not the rule but that venue provisions such as section 1404(a) are not retroactive. In the case of *Vaughan* v. *Empresas Hondurenas S A.* U. S. Court of Appeals, 5th Circuit (decided December 3, 1948) 171 F. 2d 46, the court held that

> Where a suit was filed and service made before effective date of the 1948 revision of the Judicial Code, the venue provisions were not applicable. 28 USCA 1391, *et seq.*

May we reiterate briefly the history of petitioner's case in Judge Wham's court? The facts are these: Petitioner's suit was filed in the District Court for the Eastern District of Illinois in October, 1947; was set for trial February 16, 1948 and was adjourned to the May term; at the May term (July, 1948) it was set for trial for November 1, 1948; on September 22, 1948, defendant filed its "Motion for Change of Venue"; on October 18, 1948 (13 days before the date set for trial, November 1, 1948) the court sustained defendant's motion and transferred the case, over petitioner's objection, to the Eastern District of Kentucky.

This case had been on the trial call of the Court for nearly a year, and was contemplated that it would proceed to trial in approximately 13 days. In fairness to the parties and in the interest of orderly administration of justice, a determination of the matter should not have been further delayed by the transfer.

Under the foregoing rule and history of petitioner's case, Judge Wham of the District Court exercised an excess of jurisdiction in entering his order to transfer petitioner's suit to a Kentucky Court. A reading of the order of Judge Wham (petitioner's brief, appendix 23) will reveal that in entering his order Judge Wham did not take into consideration the justice or fairness to the parties involved.

Wherefore, petitioner prays for the issuance of a writ of mandamus to the District Court for the Eastern District of Illinois, directing that it revoke and expunge from the record, its order of October 18, 1948, transferring said cause to the Eastern District of Kentucky, and for a writ of prohibition to the District Court for

the Eastern District of Kentucky, preventing it from proceeding with the trial of said cause on the grounds that it is without jurisdiction over said action; that certiorari issue and such further orders and relief as the Court deems meet in the premises.

Respectfully submitted,

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